SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1236

[redacted],

[redacted],

MAXWELL A. STURTZ, Trustee in Bankruptcy of AMPHITHEATRE, INCORPORATED,

Petitioner,

NEW YORK WORLD'S FAIR 1964-1965 CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court (37a-48a)* is unreported. The opinion of the Court of Appeals (136a-141a) is reported at 405 F.2d 309.

* Figures followed by "a" refer to pages of the appendix to the petition. Those preceded by "R" refer to pages of the Record. Such references relating to exhibits are to the pages at which the exhibit was introduced. As to matter included in the appendix to the petition, the citation is to that appendix rather than to the Record.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether former New York Real Property Law §233 (now General Obligations Law §7-103), requiring that money deposited as security under a lease be held in trust by the landlord, was violated by a lease provision under which the bankrupt, tenant of a building in which it undertook to present a show at the New York World's Fair, deposited as security Notes of the landlord, respondent, in the principal amount of $250,000, which Notes were part of a large issue sold for the purpose of financing the Fair.

2. Whether the courts below properly applied the standard of General Order 47 in holding that the Referee had erroneously decided that the transaction was prohibited by the New York statute.

Statute Involved

The pertinent provision of the New York Real Property Law in effect at the time of the transaction (§233) is set forth at page 2b of the appendix to the petition.

Statement of the Case

Under an Agreement of Lease (Ex. 6, R 98) between respondent and the bankrupt dated May 5, 1961, the bankrupt undertook to use the leased premises to present an "entertainment spectacular" at the New York World's Fair which was to be operated by respondent in 1964 and 1965. The term of the lease commenced January 1, 1962 and was to expire, unless sooner terminated, on the final day of the Fair in 1965. Article Forty-first of the lease (110a-111a) provided that the bankrupt would deposit with respondent "$250,000 principal amount of the Fair Corporation's 6% Promissory Notes, purchased from the Fair Corporation * * *, as security for the full, faithful and prompt performance of * * * this lease * * *."

At the time of the negotiations leading to the lease, respondent was seeking subscriptions to a $40 million Note issue to finance the construction and pre-opening expense of the Fair (119a). Subscribers to the Notes became parties to a Subscription Agreement dated as of December 1, 1960 between the Fair Corporation and The Chase Manhattan Bank, as Agent (Ex. G, R 183). Pursuant to its obligation under the lease, the bankrupt signed a Subscription (Ex. E, R 176) making it a party to the Subscription Agreement.

Shortly after the Fair opened in 1964, the bankrupt defaulted under the lease by filing a petition under Chapter XI of the Bankruptcy Act (116a). When respondent sought by petition filed with the Referee in Bankruptcy to recover possession of the leased premises, the trustee

counterclaimed for the sum of $250,000, alleging that that sum had been deposited as security and had been improperly commingled with monies of respondent in violation of the New York statute.

The Referee granted summary judgment in favor of the trustee on its counterclaims, which was reversed by the District Court (Rosling, J.) in a decision dated April 27, 1965 (1a-36a). The Court also denied a cross-motion by the Fair Corporation for summary judgment, and remanded the case to the Referee for trial of the issue whether the security provision of the lease was a subterfuge designed to evade the statute.

After trial, the Referee handed down a lengthy decision (49a-135a) in which he reviewed the testimony and made findings that the purchase of the Notes constituted a loan to the Fair Corporation which was agreed to in good faith as a result of arm's-length bargaining in which there was no mention of the New York statute. He concluded, nevertheless, that the statute was violated "because such alleged loan would be a violation of the non-waiver provision of the statute which prevents the creation of a debtor-creditor relationship by the deposit of tenant's security under the lease" (134a).

That decision was reversed by the District Court (Dooling, J.) in a memorandum and order dated February 29, 1968 (37a-48a). Judge Dooling held that "there was no misuse of a statutory deposit of money and, in necessary consequence, no breach of a statutory trust" (48a). The Court of Appeals unanimously affirmed (136a-141a).

It held that the New York cases "indicate that bona fide loan arangements between landlords and tenants, at least which relate to the leased premises, do not violate section 233 when the money is used to acquire title to or benefit the leased premises" (141a).

Argument

1. The case involves the applicability of a state statute to a very special situation which is not likely to recur. That issue of state law was correctly decided. *800 Union St. Corp.* v *Bookben Realty Corp.*, 302 N.Y. 926; *Barrow Associates* v. *South Broad Realty Corp.*, 275 App. Div. 914; *Ja-Mo Associates, Inc.* v. *56 Fulton St. Garage Corp.*, 30 A.D.2d 287; *Land* v. *Gladol Realty Corp.*, 18 Misc.2d 103.

The *Ja-Mo Associates, Inc.* case, decided while this case was pending in the Court of Appeals, shows the obvious correctness of the decision below. Money was there loaned by the tenant to the landlord to enable it to acquire title to the leased premises. The loan was secured by a mortgage which was assigned to the landlord "as security for the performance of this lease." In line with the earlier cases cited above, the Court held that the transaction was not one in which there was a deposit of money as security and not within the statute.

Even if the decision below on the question of state law were doubtful, which it is not, the issue is plainly not one calling for review by this Court.

2. There is no meaningful conflict of decisions. Petitioner attempts to justify review by reason of a supposed conflict among the Circuits as to the scope of review of a finding made by a Referee in Bankruptcy. That attempt must fail. The asserted conflict relates to the issue whether the Court of Appeals reviews the correctness of the Referee's findings under the "clearly erroneous" rule of General Order 47 or whether it reviews the action of the District Court in deciding that question. A full answer to the supposed conflict is found in the opinion of Judge Learned Hand in *Morris Plan Industrial Bank* v. *Henderson,* 131 F.2d 975 (2d Cir. 1942). Judge Hand there wrote (at 976):

> "It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous.' Possibly the Seventh Circuit meant to make that distinction in a case that arose under General Order 47 before it was amended. In re Duvall, 103 F.2d 653. We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem."

3. Assuming the conflict to be a real one, resolution of the issue cannot conceivably affect the outcome of this case. The Second Circuit has adhered strictly to the mandate of General Order 47 that findings of fact by a Referee are to be accepted "unless clearly erroneous." *In re Tabibian,* 289 F.2d 793 (2d Cir. 1961); *Margolis* v. *Nazareth Fair Grounds & Farmers Market, Inc.,* 249 F.2d 221 (2d Cir. 1957). Judge Dooling also recognized the standard of General Order 47 in dealing with the only issue as to

which there was any conflict in the testimony, whether the bankrupt had ever offered a cash deposit as security. He held the point immaterial, since the record contained no suggestion "that the Fair ever assented to the injection of that possible alternative into the negotiation, or that it was ever agreed to by the Fair and thereafter abandoned, or disguised, or transmuted into paragraph Forty-first" (47a).

In so characterizing the record, Judge Dooling did not differ with the Referee. Specific findings that there was a bona fide loan agreement and no intention to evade the statute are embodied in the following paragraphs of his decision (117a-119a):

> "20. Amphitheatre's subscription amounted to one per cent of the total of the 25 million subscriptions required to make the subscription agreement effective in accordance with its terms, and according to the terms of the subscription agreement, which were not amended, the monies paid to purchase the Fair notes constituted a loan to that Corporation by Amphitheatre of $205,000."
>
> "23. Amphitheatre agreed in good faith to subscribe to the notes as a result of arm's-length bargaining, and with the full understanding on the part of Fair Corporation and Amphitheatre that Amphitheatre would thereby become a party to the subscription agreement, to which all other purchasers of notes were parties, as the subscription agreement was modified by Amendatory Agreement No. 3."
>
> "25. The notes were part of an issue of $40 million that was offered to the public for the purpose of raising funds to pay the cost of construction and preopening expenses of the New York World's Fair.

During the period in which the lease was being negotiated, the Fair Corporation was seeking subscriptions to the note issue from prospective exhibitors at the World's Fair and others."

"26. Amphitheatre was dependent entirely on visitors to the World's Fair for audiences at the show which it was to present on the premises, and its promoters desired the Fair to become operative so that visitors would be attracted to it and attend its show."

"28. At no time during the negotiations was there any mention of the New York Statute relating to the deposit of money as security under a lease of real property (then Section 233 of the Real Property Law; now Section 7-103 of the General Obligations Law)."

The foregoing findings make it plain that the difference between the Referee and the two courts was not one on which credibility was a factor. The petition recognizes (pp. 10, 12) that the basic facts are not in dispute. Neither court below reversed or disregarded any finding of the Referee on those basic facts. The petition refers (p. 15), however, to a finding by the Referee that the payment of $250,000 was not intended by the bankrupt "to be an investment in the Fair Corporation's enterprise". In context, this can mean no more than that, in the absence of the lease obligation, the Notes would not have been purchased, a fact which was expressly recognized by both courts (39a, 138a). Otherwise, it is patently irreconcilable with the documents themselves and with the specific finding quoted above, that the Notes were purchased as a result of arm's-length bargaining with full understanding of the Subscription Agreement.

The petition also refers (p. 16) to a finding that the intent on the part of the Fair Corporation was to obtain

full payment for the Notes at the earliest possible date (117a), and much of the evidence at the trial related to amendments to the lease and the Subscription Agreement which were designed to effectuate that purpose (Ex. J, R. 239; Ex. K, R. 392). Petitioner implies (p. 17) that that finding and the related finding as to the purpose of the two amendments (120a) were ignored or overturned by the two courts in stating that "the parties *intended* to transact a loan". If there is inconsistency between the Referee's findings and that of the two courts, the Referee's decision is internally inconsistent, since he expressly found that the monies paid to purchase the Notes "constituted a loan * * * of $250,000" (117a) to which the bankrupt "agreed in good faith * * * as a result of arm's-length bargaining" (118a).

The intention to have as security Notes which were fully paid for rather than an executory agreement to subscribe to Notes is certainly not equivalent to an agreement to deposit money as security. The reason for seeking prompt payment for the Notes is plain. The security was to cover all the tenant's obligations under the lease, not merely the payment of rent but also the production of an expensive show. For that reason, the first form of security sought by the Fair Corporation was a surety company bond (72a, 112a). The substitution of Notes for such a bond advanced the interests of both parties in the successful launching of the Fair.

4. The Referee purported to recognize that, under the decision of Judge Rosling denying summary judgment to both parties, the issue to be tried was whether the con-

tracts between the parties were intended to "have meanings and effects other than those they express" so as to bring them within the statute (64a). His specific findings of fact to the effect that there was a bona fide loan agreement show that, on the facts, he answered that question in the negative. This required the conclusion that the statute was not violated. His contrary conclusion was plainly based on the erroneous view that the statute prohibits the creation of any debtor-creditor relationship between landlord and tenant in connection with the security. That error appears most plainly in the following question-begging statement of the ground for his decision (134a):

> "The Fair's contention that a loan was accomplished cannot be sustained because such alleged loan would be a violation of the non-waiver provision of the statute which prevents the creation of a debtor-creditor relationship by the deposit of tenant's security under the lease. Also for the same reason the Fair Corporation Notes issued in the name of Amphitheatre are not the security, but are merely further evidence of the amount of Amphitheatre's deposit under Article Forty-first of the lease."

Accordingly, this is not a case in which, as petitioner asserts (petition, p. 10), "the Referee's ultimate findings consisted of factual deductions and inferences from basic facts not in dispute." It is one in which a patently erroneous legal conclusion was drawn from those undisputed facts. Both courts below properly rejected that legal conclusion on the authority of the controlling New York cases.

Conclusion

The petition should be denied.

Respectfully submitted,

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